Supreme Court of the United States.

No. 116—October Term, 1902.

Henry Bigelow Williams and Charles F. Ayer, Trustees, Plaintiffs in Error, *vs.* Herbert Parker, Attorney General of Massachusetts.	In error to the Supreme Judicial Court of the State of Massachusetts.

[February 23, 1903.]

On May 23, 1898, the legislature of Massachusetts passed the following act:

"Sec. 1. Any building now being built or hereafter to be built, rebuilt or altered in the city of Boston, upon any land abutting on St. James avenue, between Clarendon street and Dartmouth street, or upon land at the corner of Dartmouth street and Huntington avenue, now occupied by the Pierce building, so-called, or upon land abutting on Dartmouth street, now occupied by the Boston Public Library building, or upon land at the corner of Dartmouth street and Boylston street, now occupied by the New Old South Church building, may be completed, built, rebuilt or altered to the height of ninety feet, and no more; and upon any land or lands abutting on Boylston street, between Dartmouth street and Clarendon street, may be completed, built, rebuilt or altered to the height of one hundred feet, and no more: *Provided, however*, That there may be erected on any such building, above the limits hereinbefore prescribed, such steeples, towers, domes, sculptured ornaments and chimneys as the board of park commissioners of said city may approve.

"Sec. 2. The provisions of chapter three hundred and thirteen of the acts of the year eighteen hundred and ninety-six, and of chapter three hundred and seventy-nine of the acts of the year eighteen hundred and ninety-seven, so far as they limit the height of buildings, shall not be construed to apply to the territory specified and restricted in section one of this act.

"Sec. 3. The owner of or any person having an interest in any building upon any land described in section one of this act the construction whereof was begun, but not completed before the fourteenth day of January in the current year, who suffers damage under the provisions of this act by reason or in consequence of having planned and begun such construction, or made contracts therefor, for a height exceeding that limited by section one of this act for the locality where said construction has been begun, may recover damages from the city of Boston for material bought or actually contracted for, and the use of which is prevented by the provisions of this act, for the excess of cost of material bought or actually contracted for over that which would be necessary for such building if not exceeding in height the limit proscribed for that locality by section one of this act, less the value of such materials as are not required on

account of the limitations resulting from the provisions of this act, and the actual cost or expense of any rearrangement of the design or construction of such building made necessary by this act, by proceedings begun within two years of the passage of this act, and in the manner prescribed by law for obtaining payment for damages sustained by any person whose land is taken in the laying out of a highway in said city.

"SEC. 4. Any person sustaining damage or loss in his property by reason of the limit of the height of buildings provided for in this act, may recover such damage or loss from the city of Boston, by proceedings begun within three years of the passage of this act, and in the manner prescribed by law for obtaining payment for damages sustained by any person whose land is taken in the laying out of a highway in said city." (Acts and Resolves of Massachusetts, 1898, chap. 452.)

The building of plaintiff in error comes within the scope of this statute, and on September 17, 1898, the attorney general of Massachusetts filed an information in the Supreme Judicial Court of that State to enjoin the maintenance of that part of the building above the ninety-feet line. To this information the defendants pleaded, among other things, that "the statute, . . . in its application to the defendants, . . . is in violation of the second clause of section 1 of the Fourteenth Amendment and of other provisions of the Constitution of the United States." Pending this proceeding the defendants commenced actions against the city of Boston for damages, as provided in sections 3 and 4 of the statute. The city filed a general denial. The defendants then moved that the attorney general be required to join the city as a party defendant, in order that the question of the city's liability to damages might be conclusively determined in this proceeding, or, in default of such joinder, that it be stayed until the city's liability could be conclusively determined. This motion was denied and the defendants appealed from the denial thereof. The facts were agreed upon and the case reserved by the presiding justice for the consideration of the full court. Upon March 13, 1901, a decree was entered, sustaining the contention of the attorney general, and directing a removal of those parts of the building above the height of ninety feet, without prejudice, however, to the right of defendants under the statute to maintain such steeples, towers, &c., as the board of park commissioners of the city of Boston should approve. (174 Mass. 476.) To review such judgment this writ of error was sued out.

Mr. Justice BREWER delivered the opinion of the Court.

Counsel for plaintiffs in error state in their brief that "the single question in the case is, substantially, whether it is consistent with due process of law for a court to decree the actual destruction of property under a statute of eminent domain by which the State takes certain rights in it, making provision for compensation only by giving the owners a right of action against a city for their damages, while the city, which had no part

in the taking, denies the validity of the provision for compensation, upon which the validity of the taking depends, and refuses to pay any damages unless and until it is held liable therefor in another proceeding, which is yet undetermined."

That the statute does not conflict with the constitution of the State is for this court settled by the decision of the State court. (*Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461, and cases cited; *Rasmussen* v. *Idaho*, 181 U. S. 198.) The constitutional provision of the State and that found in the Fifth Amendment to the Federal Constitution are substantially alike. The Massachusetts provision reads: "Whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." (Declaration of Rights, Art. X.) And the Fifth Amendment says: "Nor shall private property be taken for public use, without just compensation."

So far as the Federal Constitution is concerned, it is settled by repeated decisions that a State may authorize the taking of possession prior to any payment, or even final determination of the amount of compensation. In *Backus* v. *Fort Street Union Depot Company*, (169 U. S. 557, 568,) we said:

"Is it beyond the power of a State to authorize in condemnation cases the taking of possession prior to the final determination of the amount of compensation and payment thereof? This question is fully answered by the opinions of this court in *Cherokee Nation* v. *Southern Kansas Railway*, (135 U. S. 641,) and *Sweet* v. *Rechel*, (159 U. S. 380.) There can be no doubt that if adequate provision for compensation is made authority may be granted for taking possession pending inquiry as to the amount which must be paid and before any final determination thereof."

We pass, therefore, to inquire as to the adequacy of the provision for compensation. No question is made as to the general solvency of the city of Boston. Although in the agreed facts it is stated that the city has no "moneys specially appropriated to any such purpose as that prescribed by the damage clauses of this statute, nor any express statutory power or authority to raise, appropriate or pay money for such a purpose," yet as this statute provides that "any person sustaining damage . . . may recover such damage . . . in the manner prescribed by law for obtaining payment for damages by any person whose land is taken in the laying out of a highway;" and as there is a general statute making suitable provision for such a recovery, the question of solvency does not seem to be material.

It is true that the city is not a party to the proceedings, and therefore not estopped to deny its liability by reason of having sought and obtained the condemnation. In that respect the statute differs from ordinary statutes giving to corporations, municipal or private, the right to condemn. While there is no technical estoppel by judicial proceeding, yet the

State Supreme Court adjudged the validity of the statute, not merely in respect to the taking, but also in respect to the liability of the city. In its opinion it said (p. 481):

"It may be contended that if the legislature could take this right for the use of the public, it could not require the city of Boston to make compensation for it, but should have provided for the payment of damages from the treasury of the Commonwealth. This contention would limit too strictly the power of the legislature in the distribution of public burdens. Very wide discretion is left with the lawmaking power in this particular. The legislature may change the political subdivisions of the Commonwealth by creating, changing or abolishing particular cities, towns or counties. It may require any of them to bear such share of the public burdens as it deems just and equitable. This right has been exercised in a great variety of ways. (*Kingman, Petitioner*, 153 Mass. 566, and cases and statutes there cited.)"

And this decision is in harmony with prior adjudications of that court.

It is also true that the proceeding here taken is in many respects novel. Perhaps no case like it has arisen in this country. But as the court of last resort of Massachusetts has treated it as a condemnation, a taking for the public use, it is a taking for the use primarily of the citizens of Boston, and comes within the repeated rulings of the State court in respect to the competency of the legislature to cast the burden thereof upon the city. And while, as stated, there may be no technical estoppel by judgment, yet in view of these rulings it would be going too far to hold that it is essential that there be a judgment establishing the liability of the city before it can be affirmed that adequate provision for compensation has been made.

That there may be novel questions in respect to the measure of damage, the value of the property that is taken, does not avoid the fact that a solvent debtor, one whose solvency is not liable to go up or down like that of an individual, but is of substantial permanence, is provided, as well as a direct and appropriate means of ascertaining and enforcing the amount of all such damage. In view therefore of the prior decisions of the Supreme Court of the State as well as that in this case, we are of opinion that it cannot be held that there was a failure to make adequate provision for the payment of the damages sustained by the taking.

We have not considered any question of purely State cognizance, nor have we stopped to comment on the suggestion made by the Supreme Court of the State, that this statute might be sustained as an exercise of the police power, or if it could be so sustained, that it could be enforced without any provision for compensation. Considering simply the distinct proposition so ably presented by the counsel for plaintiffs in error, we are of opinion that the statute in question cannot be adjudged in conflict with the Federal Constitution, and therefore the judgment of the Supreme Judicial Court of Massachusetts is

Affirmed.